[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 07-5347

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,
Plaintiff-Appellant,

v.

SECRETARY OF STATE,
Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# BRIEF FOR THE APPELLEE

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**A. Parties and Amici:**

Plaintiff-Appellant is Menachem Zivotofsky.

Defendant-Appellee is the Secretary of State.

**B. Rulings Under Review:**

Appellant seeks review of the September 19, 2007 order and decision dismissing all of his claims by the United States District Court for the District of Columbia, Judge Gladys Kessler, in Civ. No. 03-1921 (GK). The district court's order appears at Joint Appendix (JA) 422 and the decision appears at JA 401 and is reported at 511 F. Supp. 2d 97 (D.D.C. 2007).

**C. Related Cases:**

This case was previously before this Court. *See Zivotofsky v. Sec'y of State*, 444 F.3d 614 (D.C. Cir. 2006). We are unaware of any related case pending in this or any other court.

Respectfully submitted,

Lewis S. Yelin
*Attorney for Appellee*

April 4, 2007

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# BRIEF FOR APPELLEE

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## JURISDICTIONAL STATEMENT

The parents of appellant Menachem Zivotofsky, acting for their son, sought judicial enforcement of Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). They invoked the district court's statutory jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. JA 8. As discussed below, the district court correctly ruled that it lacked subject

matter jurisdiction because Zivotofsky's complaint raises a nonjusticiable political question.

The district court dismissed this action on September 19, 2007. JA 401. Zivotofsky's parents filed a timely notice of appeal on October 18, 2007. JA 424. This Court has statutory jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

The parents of appellant Menachem Zivotofsky, an American citizen born in Jerusalem, challenge the Secretary of State's decision, pursuant to longstanding United States policy and State Department regulations, to identify on his passport Zivotofsky's place of birth as "Jerusalem" rather than "Israel." Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, states that the Secretary of State "shall, upon the request of the citizen [born in Jerusalem] or the citizen's legal guardian, record the place of birth as Israel." The questions presented are:

1. Whether the district court correctly determined that this case presents a nonjusticiable political question;

2. Whether Section 214(d) is advisory or mandatory;

3. Whether Section 214(d), if mandatory, impermissibly interferes with the President's exclusive constitutional authority to recognize foreign sovereigns.

## STATUTES AND REGULATIONS

The pertinent statutes and regulations are contained in the addendum to this brief and in the joint appendix.

## STATEMENT OF THE CASE

Through his parents, Menachem Zivotofsky, a United States citizen born in Jerusalem, sued the Secretary of State, seeking to compel the Secretary to record "Israel" as the place of birth in his passport and Consular Report of Birth Abroad. For over fifty years, it has been the consistent policy of the United States not to recognize any nation as having sovereignty over Jerusalem, leaving that issue to be decided by the parties through negotiations. This Court previously determined that Zivotofsky had standing to sue, and it remanded for development of the record, primarily concerning the foreign policy consequences of recording "Israel" in the passports of United States citizens born in Jerusalem. In the district court, Zivotofsky argued that a provision of the Foreign Relations Authorization Act for Fiscal Year 2003 required the Secretary, upon request, to record "Israel" as the place of birth of any United States citizen born in Jerusalem. Considering the evidence submitted by the State Department, the district court dismissed the action as nonjusticiable because it raises a political question. Zivotofsky now appeals.

## STATEMENT OF THE FACTS

### I. The Constitutional Framework

The Constitution distributes the Nation's foreign relations powers between the Executive and the Legislative Branches, but assigns none of those powers to the courts. Some foreign affairs powers are shared between the political branches. For example, subject to the advice and consent of the Senate, the Constitution gives the President the power to make treaties and appoint ambassadors. U.S. Const. Art. II, § 2, cl. 2. To Congress, the Constitution assigns the powers to regulate foreign commerce (Art. I, § 8, cl. 3); to regulate the value of foreign currency (Art. I, § 8, cl. 5); to make laws to punish offenses against the law of nations (Art. I, § 8, cl. 10); to declare war and make rules concerning captures (Art. I, § 8, cl. 11); and to raise and support armies (Art. I, § 8, cl. 12). To the President, the Constitution assigns "the executive Power" of the United States (Art. II, § 1, cl. 1) — a grant of power that, by historical gloss and under settled precedent, gives the President the "'vast share of responsibility for the conduct of our foreign relations.'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). More specifically, the Constitution designates the President as the "Commander in Chief of the Army and Navy of the United States" (Art. II, § 2, cl. 1) and, of particular significance to this case, assigns

solely to the President the power to "receive Ambassadors and other public Ministers" from foreign countries (Art. II, § 3).

Because the power to receive ambassadors includes the power to decide which ambassadors to receive and, hence, with which governments to establish diplomatic relations, the Supreme Court has long held that the Constitution vests exclusively in the President the power to recognize foreign states. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."); *United States v. Pink*, 315 U.S. 203, 229 (1942) (same); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (same). Moreover, the Supreme Court has held that the President's power to establish diplomatic relations "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229. As a consequence of these principles, it is well settled that the Executive Branch has the sole authority to determine "which nation has sovereignty over disputed territory." *Baker v. Carr*, 369 U.S. 186, 212 (1962); *accord Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1203–04 (5th Cir. 1978). Thus, the Supreme Court has explained that when the Executive "assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the

judicial department" and "obligatory on the people and government of the Union." *Williams*, 38 U.S. at 420.

## II. Foreign Policy and Statutory Background

### A. United States Policy Concerning the Status of Jerusalem

The status of Jerusalem is one of the most sensitive and long-standing disputes in the Arab-Israeli conflict, having remained unsettled since 1948. *See, e.g.*, JA 56–57. Since the Truman administration, it has been consistent United States policy that the question of Jerusalem is a matter to be resolved by negotiation between the parties to that conflict. *Id.* at 57. The recognized representatives of Israel and the Palestinian people have agreed since 1993 that Jerusalem is one of the core issues that needs to be addressed bilaterally in permanent status negotiations.[1]

The United States has remained committed to promoting a final and permanent resolution of these core issues, including the status of Jerusalem, with the

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[1] *See, e.g.*, Israel-PLO Recognition, Exchange of Letters between Prime Minister Rabin and Chairman Arafat (Sept. 9, 1993), *available at* http://www.state.gov/p/nea/rls/22579.htm; Declaration of Principles on Interim Self-Government Arrangements, Art. V, *done* Washington, D.C. (Sept. 13, 1993), *available at* http://www.state.gov/p/nea/rls/22602.htm; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Arts. XVII and XXXI, *done* Washington, D.C. (Sept. 28, 1995), *available at* http://www.state.gov/p/nea/rla/22678.htm; A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/20062.htm; and Joint Understanding on Negotiations, *concluded* Anapolis, MD (Nov. 27, 2007), *available at* http://www.whithouse.gov/news/releases/2007/11/20071127.html.

support of the international community, in order to achieve the goal of two democratic states, Israel and Palestine, living side-by-side in peace and security. Toward that end, following the resumption in June 2007 of normal government-to-government contacts with a new Palestinian Authority government which has accepted previous agreements with Israel and rejects the path of violence, the President recently launched an initiative to lead to serious negotiations between the parties toward agreement on all issues, including the status of Jerusalem. The President stated that the parties'

> negotiations must resolve difficult questions and uphold clear principles. They must ensure that Israel is secure. They must guarantee that a Palestinian state is viable and contiguous. And they must lead to a territorial settlement, with mutually agreed borders reflecting previous lines and current realities, and mutually agreed adjustments. America is prepared to lead discussions to address these issues, but they must be resolved by Palestinians and Israelis themselves. Resolving these issues would help show Palestinians a clear way forward. And ultimately, it could lead to a final peace in the Middle East — a permanent end to the conflict, and an agreement on all the issues, including refugees and Jerusalem.

President George W. Bush, President Bush Discusses the Middle East (July 16, 2007), http://www.whitehouse.gov/news/releases /2007/07/print/20070716-7.html; *see also* Special Briefing by Secretary of State Condoleezza Rice (June 18, 2007), *available at* http://www.state.gov/secretary/rm/2007 /06/86750.htm.

In November 2007, the United States convened a major international conference at Annapolis, Maryland to promote negotiations between the parties. During that conference, the Israeli and Palestinian leaders concluded a Joint Understanding committing, among other things, to "immediately launch good-faith bilateral negotiations in order to conclude a peace treaty, resolving all outstanding issues, including all core issues, without exception, as specified in previous agreements." President George W. Bush, President Bush Attends Annapolis Conference (Nov. 27, 2007), http://www.whitehouse.gov/news/releases/2007/11/20071127-2.html. More recently, the President and the Secretary of State traveled to the Middle East to meet with Israeli and Palestinian leaders and to encourage progress in fulfilling this commitment. In his remarks after meeting with those leaders, the President stated: "I know Jerusalem is a tough issue. Both sides have deeply felt political and religious concerns. I fully understand that finding a solution to this issue will be one of the most difficult challenges on the road to peace, but that is the road we have chosen to walk." President George W. Bush, President Bush Discusses Israeli-Palestinian Peace Process (Jan. 10, 2008), http://www.whitehouse.gov/news/releases/2008/01/print/20080110 -3.html.

As the State Department explained to the district court, within this "highly sensitive" and "politically volatile" context, "U.S. Presidents have consistently

endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." JA 59. The Department of State has thus determined that "[a]ny unilateral action by the Untied States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress [toward peace]. * * * [A]ny United States change with respect to Jerusalem * * * [would] cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict." *Id.* at 58–59.

The United States' policy concerning Jerusalem is reflected in the State Department's policies and procedures for preparing passports and reports of birth abroad of United States citizens born in Jerusalem. As a general rule, the country recognized by the United States as having sovereignty over the place of birth of a passport applicant is recorded in the passport. JA 378 (7 Foreign Affairs Manual (FAM) 1383.5-4) (noting "the general policy of showing the birthplace as the country

having present sovereignty"). But because the United States does not currently recognize any country as having sovereignty over Jerusalem, under United States policy and State Department implementing regulations, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city. JA 387 (7 FAM 1383, Ex. 1383.1). Similarly, because Israel does not have sovereignty over the occupied territories of the West Bank and Gaza Strip, United States policy as implemented through State Department regulations is to record "West Bank" and "Gaza Strip" in the passports of United States citizens born in those locations. JA 378 (7 FAM 1383.5-5); see *ibid.* ("NOTE: Do not enter ISRAEL in U.S. passports as the place of birth for applicants born in the occupied territories.").[2]

The State Department has determined that "U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel." JA 56. Recording "Israel" as the place of birth of United States citizens born in Jerusalem would be perceived internationally as a

[2] In October 2007, the State Department revised the Foreign Affairs Manual provisions governing the place of birth designation of United States citizens born in Israel, Jerusalem, and Israeli-Occupied Areas. *See* 7 FAM 1360, Apx. D, Birth in Israel, Jerusalem, & Israel-Occupied Areas (2007). The revision of these provisions effected no change in policy and was intended only to reorganize and clarify existing policy. The revised provisions are not currently publicly available, but we have reproduced them in the addendum to this brief for the Court's convenience.

"reversal of U.S. policy on Jerusalem's status" that "would be immediately and publicly known."[3] JA 61. "The implications" of that change would be "adverse and dramatic." *Ibid.* It would "represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests." *Id.* at 56. It could also "provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." *Id.* at 61.

### B. Section 214 of the Foreign Relations Authorization Act of 2003

In September 2002, the President signed into law the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contained various provisions relating to Jerusalem.

Subsection (a) "urges the President * * * to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." Pub. L. No. 107-228, § 214(a). Subsection (b) states that none of the funds authorized to be appropriated by the Act may be used to operate the United States consulate in Jerusalem unless

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[3] The public reaction in the Middle East and elsewhere to the enactment of Section 214(d) gives some indication of the effects that would follow any actual reversal of U.S. policy regarding the status of Jerusalem. *See, e.g.*, JA 59–61, 396–400.

that consulate "is under the supervision of the United States Ambassador to Israel." *Id.* § 214(b). Subsection (c) states that none of the funds authorized to be appropriated may be used for publication of any "official governmental document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel." *Id.* § 214(c). And Subsection (d), on which Zivotofsky relies, states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Id.* § 214(d).[4]

In his signing statement for this legislation, the President interpreted as advisory various provisions of the Act that, if construed as mandatory, would "impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy." JA 15 (President George W. Bush, Statement on Signing the Foreign Relations Authorization Act, 38 Weekly Compilation of Presidential Documents 1658 (Sept. 30, 2002)). Section 214 is among the provisions the President construed as advisory. *Ibid.* As the President explained:

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign

[4] Congress has enacted provisions similar to Section 214(d) in subsequent legislation. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. J, § 107, 122 Stat. 1844, 2287.

> affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

JA 17.

## III. The Prior Proceedings

Menachem Zivotofsky was born in 2002 in Jerusalem. JA 8. Because his parents are United States citizens (*id.* at 9), Zivotofsky, too, is a United States citizen (*see* 8 U.S.C. § 1401(c)). After Zivotofsky's birth, his mother filed an application on his behalf for a consular report of birth abroad and a United States passport. JA 9. She asked that these documents indicate Zivotofsky's place of birth as "Jerusalem, Israel." *Ibid.* United States diplomatic officials informed Mrs. Zivotofsky that passports issued to United States citizens born in Jerusalem could not record "Israel" as the place of birth. *Ibid.* When the Zivotofskys received Menachem's passport and consular report, both documents recorded his place of birth as "Jerusalem." *Ibid.*

On his behalf, Zivotofsky's parents filed this action against the Secretary of State seeking to compel the State Department to identify Menachem's place of birth as "Jerusalem, Israel." JA 9–10. The district court dismissed the complaint. *Id.* at 39–40. The district court held that Zivotofsky had failed to establish injury in fact,

and therefore lacked standing to bring suit. *Id.* at 33–36. Independently, the district court held that Zivotofsky's complaint raised a political question because it squarely implicates the United States' position on whether a foreign state has sovereignty over disputed foreign territory. *Id.* at 37. That issue is nonjusticiable, the district court determined, because it comes within the recognition power, which the Constitution exclusively assigns to the Executive Branch. *Id.* at 36–38.

This Court reversed. The Court held that Zivotofsky had alleged sufficient injury to establish standing by alleging that "Congress conferred on him an individual right to have 'Israel' listed as his place of birth on his passport and on his Consular Birth Report," which "is at the least a colorable reading of the statute." *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006). Further, because Zivotofsky had alleged that the Secretary of State violated that asserted statutory right, this Court determined that those allegations are "sufficient for Article III standing." *Ibid.*

The Court did not decide the political question issue because the case "no longer involves the claim the district court considered." *Ibid.* As noted, Zivotofsky's complaint sought to have "Jerusalem, Israel" recorded in his official documents. *See* JA 10. However, Section 214(d) "speaks only in terms of 'Israel.'" *Zivotofsky*, 444 F.3d at 616 n.1. For that reason, Zivotofsky abandoned his claim to have "Jerusalem, Israel" recorded as his place of birth and "sought only the designation 'Israel.'" *Ibid.*

The Court concluded that "[w]hether this, too, presents a political question" requires consideration of a number of factual issues, such as the foreign policy consequences of recording "Israel" on the passports of United States citizens born in Jerusalem. *Id.* at 619–20. The Court noted that it also depends "on the meaning of § 214(d) — is it mandatory or, as the government argues, merely advisory?" *Id.* at 619. The Court thus remanded the case to the district court "so that both sides may develop a more complete record." *Id.* at 620.

On remand, the State Department responded to Zivotofsky's interrogatories relating to the political question issue. JA 51–74. And Zivotofsky took the deposition of the Deputy Assistant Secretary for Overseas Citizens Services in the Bureau of Consular Affairs in the State Department. *Id.* at 75–109. Zivotofsky filed a motion for summary judgment, and the State Department filed a renewed motion to dismiss for lack of subject matter jurisdiction. In support of its motion to dismiss, the State Department submitted four exhibits: (1) its responses to Zivotofsky's interrogatories (*id.* at 51–74); (2) State Department regulations governing passport preparation (*id.* at 376–95); (3) a State Department cable issued in October 2002 after enactment of Section 214(d) instructing United States missions abroad to "use all possible means" to explain that United States policy toward Jerusalem had not changed (*id.* at 396–97); and (4) a declassified cable dated October 2002 from the United States

Consulate in Jerusalem to the Secretary of State explaining the condemnation of Section 214(d) by "Palestinians from across the political spectrum" (*id.* at 398–400).

The district court granted the Secretary's motion to dismiss, concluding that Zivotofsky's complaint "raises a quintessential political question which is not justiciable by the courts." JA 409. The district court determined that at least four of the six "*Baker* factors" were implicated by this case. *See Baker*, 369 U.S. at 217 (identifying six factors, the presence of any one of which indicates the existence of a nonjusticiable political question). First, the district court held that adjudication of Zivotofsky's claim would require the court to pass on the validity of the Executive Branch's determination concerning Jerusalem. JA 411. But the Constitution commits exclusively to the Executive Branch the power to recognize foreign sovereigns and to decide the policy of the United States toward disputed claims over foreign territory. *Id.* at 410. Second, and relatedly, the district court determined that it could not identify any judicially manageable standards (nor did Zivotofsky identify any) for weighing the foreign policy consequences of permitting a change — even a symbolic change — in the United States' policy toward Jerusalem. *Id.* at 411–13.

Third, the district court determined that it could not pass on Zivotofsky's claim without expressing lack of respect to either the Executive or Legislative Branch. If it upheld Zivotofsky's claim under Section 214(d), the court would offend the Executive

Branch's fifty-year policy of not recognizing the sovereignty of any state over Jerusalem pending a negotiated resolution of its status. *Id.* at 414–15. And because the district court determined that Section 214(d) could only be construed as mandatory, it concluded that it could not rule against Zivotofsky on the merits of his claim without offending Congress. *Id.* at 415–16. Fourth, the district court held that adjudication of the case has the potential "'of embarrassment from multifarious pronouncements by various departments on one question.'" *Id.* at 416 (quoting *Baker*, 369 U.S. at 217). "The effect of conflicting pronouncements by coordinate branches on the political status of Jerusalem is already apparent," the court noted. *Id.* at 617. Should the court "add its voice to those of the President and Congress," a "controversial reaction is virtually guaranteed," which would "only complicate and undermine United States efforts to help resolve the Middle East conflict." *Ibid.* Finally, the district court observed that Zivotofsky made no attempt to explain why the *Baker* factors were not implicated by his complaint. Instead, the only arguments he raised were "irrelevant to the *Baker* analysis" and, in any event, lacked merit. *Ibid.*; *see id.* 418–20. Accordingly, the district court dismissed Zivotofsky's complaint for lack of subject matter jurisdiction. *Id.* at 420–21.

## SUMMARY OF ARGUMENT

For over fifty years, the United States has refrained from taking any position or action that could be interpreted as prejudging the status of Jerusalem in order to maintain its ability to work with the Israelis, Palestinians, and others toward a peaceful resolution of the Middle East conflict. Menachem Zivotofsky, a United States citizen born in Jerusalem, seeks to compel the Secretary of State to record "Israel" as his place of birth on this passport. But a United States citizen born in Jerusalem has no judicially enforceable right to have "Israel" recorded as his place of birth in his passport or citizenship documents. Accordingly, this Court should affirm the district court's judgment of dismissal.

**I.** Zivotofsky has no judicially enforceable right because his complaint presents a political question. The power to recognize foreign sovereigns — including the power to recognize claims over disputed foreign territory — is textually committed by the Constitution to the President, and is therefore not subject to judicial override. Zivotofsky argues that the Executive Branch's decision to record only "Jerusalem" does not implicate the recognition power. That claim is incorrect. A passport is an official government document through which the United States communicates with foreign governments. And the Executive Branch regulates which country or geographic location may be recorded as a citizen's place of birth, based on the

Executive's recognition of sovereignty over the territory where the citizen was born. For the most critical of foreign policy reasons, the Executive Branch has determined that the United States must take no unilateral action to recognize the sovereignty of any country over Jerusalem. The Executive has also determined that recording "Israel" as the place of birth in the passport of a United States citizen born in Jerusalem would be inconsistent with the United States' longstanding foreign policy. These foreign policy judgments are not subject to review.

Zivotofsky's complaint presents a political question for the additional reason that there are no judicially manageable standards by which this Court could adjudicate Zivotofsky's claim. Zivotofsky's contention that Section 214(d) provides the applicable standard is incorrect. As explained below, Congress lacks the constitutional authority to recognize foreign sovereigns. Even if the recognition power were shared between the political branches, Section 214(d) still could not provide the basis for decision. Although a court may interpret the Constitution to determine how a power is divided among the branches, a court may not resolve an inter-branch dispute where, as here, there is no manageable standard of decision. Because the recognition of foreign sovereigns and foreign sovereignty over territory is an inherently political matter, any inter-branch dispute must be resolved solely through the political process.

**II.** On the merits, Section 214(d) constitutes only a legislative recommendation — not a command — to the Executive Branch with respect to recognition of sovereignty over Jerusalem. Although Section 214(d) states that the Secretary of State "shall" record Israel on the passport of citizens born in Jerusalem and in the reports of the citizens' birth abroad, that term is best understood as advisory rather than mandatory in this context. Indeed, several interpretive considerations support an advisory construction of Section 214(d). A mandatory construction would raise a serious question whether Congress has unconstitutionally limited the President's exercise of his recognition power, and an advisory construction is thus appropriate for constitutional avoidance reasons. Moreover, Congress has long recognized the President's constitutional authority to prescribe rules regulating passports, as reflected in a statute enacted in 1856, and presently codified at 22 U.S.C. § 211a. An advisory construction is thus supported by interpretive presumptions that Congress does not lightly intend to abrogate settled historical understandings, to effect implied repeals, or to regulate presidential action — much less to do all of these at once. Finally, the President has formally construed Section 214(d) to be advisory, and courts owe that construction a considerable degree of deference.

If construed to be mandatory, Section 214(d) is unconstitutional. Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power.

## STANDARD OF REVIEW

This Court reviews de novo a dismissal for lack of jurisdiction. *Piersall v. Winter*, 435 F.3d 319, 321 (D.C. Cir. 2006). In ruling on a motion to dismiss for lack of subject matter jurisdiction, a "court may consider materials outside the pleadings." *Venetian Casino Resort, L.L.C. v. EEOC*, 409 F.3d 359, 366 (D.C. Cir. 2005).

## ARGUMENT

### I. This Case Presents a Non-Justiciable Political Question.

"The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary is as old as the fundamental principle of judicial review." *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (quotation marks omitted). In *Baker v. Carr*, the Supreme Court identified six factors, the presence of any one of which indicates that the case presents a non-justiciable political question. *See Schneider*, 412 F.3d at 194 ("[W]e need only conclude that one factor is present [to conclude that a case presents a political question]."). As in the district court, Zivotofsky makes no attempt on appeal to demonstrate that his complaint implicates none of the six *Baker* factors. *See*

JA 417 ("Plaintiff fails to address the six *Baker* factors."). But it is a plaintiff's burden to establish that the district court has jurisdiction to adjudicate his or her claims. *See, e.g., McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1939). In any event, Zivotofsky's complaint implicates at least the first two of the six Baker factors: It involves both a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217.

### A. This Case Involves a Textually Demonstrable Constitutional Commitment to the Executive Branch.

While the Constitution vests some foreign policy powers in Congress and others in the Executive Branch, it "provides no authority" to the courts "for policymaking in the realm of foreign relations." *Schneider*, 412 F.3d at 195; *see Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006) ("[T]he fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy."). This case implicates the power to recognize foreign sovereigns. As the district court recognized, that power is constitutionally committed to the Executive Branch alone and is not subject to judicial override. JA 410. Because this case inherently involves a "textually demonstrable constitutional commitment of the issue" to the President, it is nonjusticiable.

### 1. The Power to Recognize Foreign Sovereigns and Disputed Foreign Territory Is Constitutionally Committed to the President.

For at least 150 years, it has been settled law that recognition of foreign sovereigns is a constitutional power vested exclusively in the President. *Baker*, 369 U.S. at 212 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.'"); *see also, e.g.*, *Sabbatino*, 376 U.S. at 410; *Pink*, 315 U.S. at 229; *Williams*, 38 U.S. (13 Pet.) at 420; *see also Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 (D.C. Cir. 1981) (Supreme Court has recognized the "President's plenary power to recognize foreign sovereigns").

It is equally well-established that the President's power to establish diplomatic relations "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229. A necessary incident of the "power to determine the policy" of recognition is the authority to determine the circumstances under which the United States will recognize a foreign state's territorial claims. *See Baker*, 369 U.S. at 212 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory."); *Williams*, 38 U.S. (13 Pet.) at 420 (when the President, "in the exercise of his constitutional functions" has decided "a fact in regard

to the sovereignty of any island or country" the determination is "conclusive on the judicial department").

### 2. Identification of Zivotofsky's Place of Birth on His Passport Implicates the Recognition Power.

In deciding to record only "Jerusalem" in the passports of American citizens born in that city, the Executive Branch exercised its constitutional power to determine the circumstances under which it will recognize the territorial claims of a foreign sovereign. Zivotofsky nevertheless argues that "designation of a passport-holder's place of birth does not involve the 'recognition of foreign sovereigns.'" Br. 27. And he contends that his suit does not "request[] any formal declaration of Israel's sovereignty over any particular area." *Ibid.* That argument is wrong.

A passport is a travel document issued by the United States showing the bearer's origin, identity, and nationality, if any, which is valid for the admission of the bearer into a foreign country. *See* 8 U.S.C. § 1101(a)(30). As the Supreme Court has recognized, a United States passport is an official government document, which is a communication from the United States to foreign governments, made on behalf of the bearer. *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer."); *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) ("[A passport is] in the character of a political document."). The Executive Branch

regulates which countries or geographic location may be recorded as a United States citizen's place of birth, based on the Executive's determination of which foreign state has sovereignty over the territory. *See, e.g.*, JA 377 ("[I]f there is a question as to what country has present sovereignty over the actual area of birth, the consular officer should verify the country having present sovereignty and change the application, if necessary.").

The provisions implementing this policy are set out in the Foreign Affairs Manual — a collection of department organizational and functional policies, standards, and procedures derived from statutes, executive orders, and other agencies' directives — and are binding on State Department officials responsible for the preparation of the relevant United States Government documentation. *See* JA 110–135. As concerns Jerusalem specifically, the relevant FAM provision states explicitly that "Israel" may not be recorded as the place of birth of a United States citizen born in Jerusalem. *Id.* at 127.

In its response to Zivotofsky's interrogatories, the State Department explained that "an official decision by the United States to begin to treat Jerusalem as a city located within Israel at the present time would represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests." JA 56. Asking this Court

to override the State Department's judgment about the foreign affairs impact, Zivotofsky instead predicts that recording "Israel" as the place of birth of United States citizens born in Jerusalem would have only a "negligible" effect on foreign policy (Br. 33) because no one at a border crossing would be able to determine whether a United States citizen whose place of birth is recorded as "Israel" was born in Jerusalem or in Tel Aviv or Haifa (*id.* at 35). As the district court concluded in its original decision, however, "[t]his argument borders on the disingenuous." JA 37.

The State Department explained in jurisdictional discovery on remand that, if "Israel" "were to be recorded as the place of birth for a person born in Jerusalem, such a reversal of U.S. policy on Jerusalem's status would be immediately and publicly known, as was enactment of Section 214 in 2002." JA 61. The effect of such "unilateral action" by the United States (JA 58) on one of the most highly sensitive issues in the peace negotiations between Israelis and Palestinians "would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the [peace process]" (JA 59). Indeed, despite the President's signing statement, Congress' enactment of Section 214(d) provoked widespread international condemnation and confusion about the United State's policy toward Jerusalem. *See, e.g.*, JA 396–99; 412–13.

Because of the "highly sensitive, and politically volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." JA 59. If the Secretary of State were to adopt a policy of identifying "Israel" in official documents as the place of birth of United States citizens born in Jerusalem, this act would invariably be seen as a recognition of Israeli sovereignty over Jerusalem in an official government document. Indeed, that is precisely why Zivotofsky's parents brought this suit. *See* JA 27 (Zivotofsky Decl. ¶ 9) ("It is important to us as a matter of conscience and we believe it will be important to our children that, if born in Israel, they be recognized as natives of Israel, and that the country of birth not be erased nor omitted from their travel documents.").

Zivotofsky contends that, because "[t]here has, apparently, been no 'severe adverse consequences' to American 'national security interests'" as a result of clerical errors resulting in a few passports recording "Israel" as the place of birth of United States citizens born in Jerusalem, no adverse consequences would follow if the Secretary adopted the policy Zivotofsky seeks. Br. 38; *see* JA 55–56. This argument is meritless, as the district court recognized. JA 420 ("[T]hese clerical errors have not

had an adverse impact on the foreign policy interests of the United States because they are just that — clerical errors, and did not constitute official statements of United States policy.").

Zivotofsky also points to *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955), *Kent v. Dulles*, 357 U.S. 116 (1958), and *Haig v. Agee*, 453 U.S. 280 (1981), as cases in which courts have adjudicated claims involving passports. Br. 40–42. Zivotofsky's reliance on those cases is unavailing. Those cases involved the circumstances under which the Executive Branch could permissibly deny a United States citizen a passport. None implicated the recognition power. And each involved a claimed violation of the right to travel abroad, a liberty protected by the Due Process Clause. *See Agee*, 453 U.S. at 307; *Kent*, 357 U.S. at 125; *Schachtman*, 225 F.2d at 941. Zivotofsky alleges no violation of a constitutionally protected liberty.

The Executive Branch has determined that it is in the United States' foreign policy interest to leave resolution of the issue of sovereignty over Jerusalem to the Israelis and Palestinians and, consequently, not to recognize any nation's sovereignty over that city at present. Under longstanding Supreme Court precedent, that determination is "conclusive on the judicial department" and "obligatory on the people and government of the Union." *Williams*, 38 U.S. at 420.

### 3. Congress' Enactment of Section 214(d) Does Not Make Zivotofsky's Complaint Justiciable.

Zivotofsky contends that "the court's only role" in this case is "to construe and apply a federal statute" — Section 214(d). Br. 19. Because Congress purportedly directed the Executive Branch to record "Israel" on the passports of United States citizens born in Jerusalem, Zivotofsky contends that the political question of Jerusalem's status "was decided *by the Congress*." *Id.* at 23. For that reason, he contends, the case does not present any political question. *Ibid.* That argument is mistaken.

As we have explained above, the Constitution exclusively assigns to the Executive the authority to recognize foreign states and to decide which foreign state has sovereignty over disputed foreign territory. Zivotofsky nowhere contests this proposition. Instead, he only relies on the general observation that "'[i]nterpretation of statutes affecting foreign affairs is not likely to be barred by [the] political question doctrine.'" Br. 25 (quoting 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3534.2 (Supp. 2005)). But because Congress does not share the recognition power and lacks authority to decide which foreign state has sovereignty over disputed foreign territory, Zivotofsky is wrong to suggest that enactment of Section 214(d) makes his complaint justiciable.

Zivotofsky also claims that, because Section 214(d) purportedly gives him an individual right, his claim is necessarily justiciable. Br. 25. That contention misunderstands the political question doctrine. The question is whether Section 214(d) gives Zivotofsky any rights that are judicially enforceable. *See Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). If a complaint implicates any of the *Baker* factors, then any rights the complaint seeks to vindicate are not judicially enforceable. *See Schneider*, 412 F.3d at 194 ("To find a political question, we need only conclude that one [*Baker*] factor is present.").

Zivotofsky further argues that the State Department must comply with Section 214(d) because it previously acquiesced in a similar requirement regarding Taiwan. Br. 35–36. In 1994, Congress enacted a provision stating that the Secretary of State shall record the place of birth in a passport of a United States citizen born in Taiwan as "Taiwan." Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994), *as amended by* State Dep't: Technical Amendments, Pub. L. No. 103-415, § 1(r), 108 Stat. 4299 (1994). The Secretary subsequently decided to permit such citizens to record "Taiwan" as their place of birth. *See* JA 142. Zivotofsky contends that the State Department "should not be permitted to pick and choose among statutes" and should be forced to record "Israel"

as the place of birth in the passports of United States citizens born in Jerusalem. Br. 36.

That argument lacks merit. Recognition decisions, like all questions of foreign policy, are inherently fact-based. *See, e.g., Bancoult*, 445 F.3d at 433 (foreign policy decisions "are delicate, complex, and involve large elements of prophecy" (quotation marks omitted)). The State Department determined that alteration of its passport policy concerning Taiwan was consistent with the United States' recognition that the People's Republic of China is the "sole legal government of China" and "Taiwan is a part of China." JA 142–43. By contrast, the State Department determined that recording Israel as the place of birth in passports of United States citizens born in Jerusalem would not be consistent with the United States' policy not to prejudge sovereignty over that city. JA 56–61. These are quintessential foreign policy judgments.[5]

The Constitution contains an exclusive, "textually demonstrable * * * commitment" of the recognition power to the President. *Baker*, 369 U.S. at 217. The

[5] Zivotofsky argues that certain provisions of the FAM that allow some United States citizens to record in their passports as their place of birth geographic designations other than countries shows "that the designation of a particular country of birth on a passport has no substantial foreign-policy effect." Br. 43. That contention is meritless. The State Department permits such substitutions when, in its determination, the substitution is not inconsistent with the United States' foreign policy.

Executive Branch has exercised that power by determining that the passports of American citizens born in Jerusalem will record only the city as the citizen's place of birth.[6] Because neither the courts nor Congress has constitutional authority to second-guess that foreign-policy determination, this case in non-justiciable.

### B. There Are No Judicially Manageable Standards for Resolving this Case.

The decision to recognize foreign sovereigns, and to recognize a foreign state's claim over disputed foreign territory, are inherently political decisions driven by the national interest and not reducible to a set of algorithmic rules. For that reason, the Supreme Court repeatedly has acknowledged that the recognition of foreign sovereigns is beyond the courts' competence. *E.g., Baker*, 369 U.S. at 212 ("[R]ecognition of foreign governments * * * strongly defies judicial treatment."); *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126, 137 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question."); *United States v. Belmont*, 301 U.S. 324, 328 (1937) ("[W]ho is the sovereign of a territory is not a judicial question."); *cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[C]ourts are

[6] The FAM provides specifically prescribed alternatives to recording Jerusalem in a very narrow set of circumstances, but in no situation is it permitted to record "Israel" a the place of birth of a United States citizen born in Jerusalem. *See* JA 114–115.

fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.").

Zivotofsky suggests that Section 214(d) provides the standard by which the courts may resolve this case. Br. 23. As we have explained, that provision cannot supply the standard because Congress lacks the constitutional power to recognize foreign sovereigns. But even if the recognition power were shared between the political branches, this case would still be non-justiciable for lack of any judicially manageable standards. Courts have the responsibility to interpret the Constitution to determine how the federal powers are divided among the branches. *See, e.g.*, *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 454 (D.C. Cir. 1982) (judicial resolution of "disagreement between the political branches as to the meaning of the Constitution" is appropriate); *cf. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1994) ("[T]he interpretation of * * * provisions of the Constitution is well within the competence of the judiciary."). But if a constitutional power is shared by the political branches, and if the judiciary has no independent standard by which to resolve an inter-branch dispute involving exercise of the power, then the court must dismiss the case as involving a nonjusticiable political question.

Even assuming that Congress shares with the Executive the power to decide the United States' recognition of disputed foreign territory, and assuming that Congress

has directed the Executive Branch to recognize Israel's sovereignty over Jerusalem by recording "Israel" as the place of birth of United States citizens born in that city, there is still no basis for a court to review the Executive Branch's contrary decision. "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — 'the political' — departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (quotation marks omitted). Any dispute between the political branches on this inherently political matter should be resolved solely through the political process. *Cf. Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) ("Here * * * we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum."). For these additional reasons, Zivotofsky's complaint is not justiciable.[7]

[7] Because Zivotofsky's complaint so clearly implicates the first two *Baker* factors, we will not address the application of the remaining factors, though we agree with the district court's determinations that adjudication of this case would be impossible without expressing a lack of respect for a coordinate branch of government (JA 414–16) and that resolution of the case involves the possibility of embarrassment from multifarious pronouncements by various departments on one question (*id.* at 416–17).

## III. Section 214(d) Is Either Precatory or Unconstitutional.

Should the Court determine that it has jurisdiction to reach the merits of Zivotofsky's claim, it should construe Section 214(d) as advisory and so affirm the district court's dismissal of Zivotofsky's complaint. *See Karst Envt'l Educ. & Protection, Inc. v. EPA*, 475 F.3d 1291, 1298 (D.C. Cir. 2007) (court may affirm dismissal for failure to state a claim even if district court dismissed for lack of subject matter jurisdiction). But if the Court determines that Section 214(d) must be construed as mandatory, the Court should hold that provision an unconstitutional infringement of the Executive Branch's exclusive recognition power.

### A. Section 214(d) Should Be Interpreted as Advisory to Avoid Constitutional Doubt.

Section 214(d) states that "upon the request" of a United States citizen born in Jerusalem, "the Secretary shall" record the citizen's place of birth as "Israel" in the citizen's passport. Pub. L. No. 107-228, § 214(d). Of course, "[t]he word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." *Ass'n of Civilian Technicians, Montana Air Chapter No. 1 v. FLRA*, 22 3d. 1150, 1153 (D.C. Cir. 1994). But courts have recognized that Congress occasionally uses "shall" not as a command, but to authorize an exercise of discretion. *E.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) ("[C]ourts in virtually every English-speaking jurisdiction have held — by

necessity — that shall means may in some contexts, and vice versa." (quotation marks and citation omitted)); *ibid.* ("certain of the Federal Rules use the word 'shall' to authorize, but not to require, judicial action") (citing Fed. R. Civ. P. 16(e); Fed. R. Crim. Proc. 11(b))). Whether "shall" is mandatory or whether circumstances warrant interpreting it as discretionary thus depends upon the context in which the term appears and the context in which the statute was enacted. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

Here several interpretive considerations — including the doctrine of constitutional avoidance and presumptions against regulating Presidential action and against implied repeals — strongly support an advisory construction of Section 214(d). In addition, the President has formally construed that provision as advisory, and the courts owe his construction a fair degree of deference

In determining whether "shall" has its usual mandatory meaning or instead authorizes an exercise of discretion, a prime consideration is the background legal principles that existed at the time of enactment. Recently, for example, the Supreme Court considered whether a provision stating that a "peace officer shall use every reasonable means to enforce a restraining order" made enforcement of restraining orders mandatory. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 759 (2005)

(emphasis omitted). The Court held that the provision was not mandatory and permitted officers "discretion to determine" that enforcement was sometimes inappropriate. *Id.* at 2806. The Court based this conclusion on the "well established tradition" and "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." *Id.* at 760, 761. "Against that backdrop," the Court explained, the state legislature would have had to provide "some stronger indication" — beyond its bare usage of the word "shall" — in order to create "a true mandate of police action." *Id.* at 761.

Similarly, in *Hecht Co. v. Bowles*, the Supreme Court construed a statute providing that, upon a certain showing, equitable relief "shall be granted." 321 U.S. 321, 322 (1944). The court construed the provision as non-mandatory, in light of the discretionary nature of "equity practice with a background of several hundred years of history." *Id.* at 329. In light of that history, the Court explained that it would not construe a statute as upsetting traditional equity practice — even in the face of the word "shall" — without clearer evidence that Congress intended to make a change: "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Ibid.*

In this case, background legal principles strongly support a non-mandatory construction of "shall." First, an advisory interpretation is required by the canon of constitutional avoidance. Under that principle, if there are two "competing plausible interpretations of a statutory text," courts should avoid the "alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This principle reflects the courts' appropriate "reluctance to decide constitutional issues," which "is especially great where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (courts should "not lightly assume that Congress intended to * * * usurp power constitutionally forbidden to it"). Because Section 214(d) can textually be construed as advisory (consistent with decisions like *Lamagno*, *Castle Rock*, and *Hecht*), and because the competing construction would raise serious constitutional questions, the advisory construction should prevail.

The presumption against implied repeal further supports an advisory construction of Section 214(d). When that provision was enacted, 22 U.S.C. § 211a authorized the Secretary of State to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States * * * under such rules as the President shall designate and

prescribe for and on behalf of the United States." Section 211a does not purport to confer power on the President to make rules for the issuance of passports, but rather recognizes the President's constitutionally based authority to prescribe such rules. As the Supreme Court has explained, even before Congress enacted the first Passport Act (the predecessor of Section 211a) in 1856, "the common perception was that the issuance of a passport was committed to the sole discretion of the Executive." *Agee*, 453 U.S. at 293. Indeed, "[f]rom the outset, Congress endorsed not only the underlying premise of Executive authority in the area of foreign policy and national security, but also its specific application to the subject of passports." *Id.* at 294. The text of the first Passport Act is virtually identical to the first sentence of current Section 211a.[8] The Act "worked no change in the power of the Executive to issue passports; nor was it intended to do so." *Agee*, 453 U.S. at 294; *see id.* at 294 n. 28 ("'[I]t was the intention of the bill to leave, all that pertains to the diplomatic service of the country * * * exclusively to the Executive, where we consider the Constitution has placed it.'" (quoting statement of Senator Mason, sponsor of the bill that became

[8] The 1856 Passport Act provided that "the Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify any such passport." *Zemel v. Rusk*, 381 U.S. 1, 32 (1965) (quoting 11 Stat. 60) (quotation marks omitted).

the first Passport Act)). Congress has enacted statutes relating to passports numerous times since 1856. *Agee*, 453 U.S. at 296–301. But each time, Congress "left completely untouched the broad rule-making authority" recognized initially by the 1856 Act. *Id.* at 301 (quotation marks omitted).

Construed to be mandatory, section 214(d) — which does not contain a "notwithstanding" clause or otherwise indicate that it was revising prior law — would effect an implied partial repeal of Section 211a. The Supreme Court has "repeatedly stated, however, that absent a clearly expressed congressional intention, repeals by implication are not favored." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (quotation marks omitted). And "[a]n implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Ibid.* (quotation marks omitted). "[I]n either case, the intention of the legislature to repeal must be clear and manifest." *Posadas v. Nat'l City Bank of NY*, 296 U.S. 497, 503 (1936); *see also Branch*, 538 U.S. at 293 (O'Connor, J., concurring in part and dissenting in part) ("We have not found any implied repeal of a statute since 1975. And outside the antitrust context, we appear not to have found an implied repeal of a statute since 1917." (citation omitted)). Indeed, the policy against construing a statute as enacting an implied repeal "applies with even greater force when," as here, "the claimed repeal

rests solely on an Appropriations Act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). Section 214(d) does not satisfy these rigorous standards to effect an implied partial repeal: It obviously does not "cover the whole subject" of Section 211a, and because it may permissibly be construed as discretionary, it is not in "irreconcilable conflict" with that provision.

Moreover, an advisory interpretation of Section 214(d) is supported by the settled rule that Congress must make a "clear statement" in order to "restrict[] or regulat[e] presidential action," because "[l]egislation regulating presidential action * * * raises 'serious' practical, political, and constitutional questions." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991); *see Public Citizen*, 491 U.S. at 466 ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."). Zivotofsky points to the fact that another provision of Section 214 "urges" the President to relocate the United States Embassy to Jerusalem. Br. 31. He concludes from this that Congress' use of "shall" in Section 214(d) has a mandatory connotation. But the unelaborated use of "shall," even when contrasted with Congress' use of "urge" in another provision, is not sufficiently clear to overcome the strong interpretive presumption against construing statutes to limit presidential action. *See Armstrong*, 924 F.2d at 289 ("[T]he requirement of clear statement assures that the

legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision." (quotation marks omitted)).

Finally, the President has interpreted Section 214(d) to be advisory. Under the Constitution, the President has the "lead role" in foreign policy. *First Nat'l City Bank*, 406 U.S. at 767. For that reason, courts appropriately give "great weight" to the Executive Branch's construction and application of treaty provisions (*Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)), and to the President's interpretation of statutes implicating his constitutionally-based foreign affairs powers (*see Acree v. Rep. of Iraq*, 370 F.3d 41, 63 n.2 (D.C. Cir. 2004) (Roberts, J., concurring)). *Cf. Public Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988) ("Of the Executive Branch officers, the President, of course, embodies the ultimate political legitimacy and therefore his views as to the manner by which his appointees will interpret a statute may not be lightly disregarded."). Because Section 214(d) implicates the President's constitutional authority to recognize foreign sovereigns, and because the President's interpretation of that provision is reasonable, this Court should give it deference.[9]

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[9] Zivotofsky argues that the Secretary is "obliged to implement" Section 214(d) because the President did not veto the bill. Br. 28. But if the provision is precatory, the Executive Branch is under no duty. And if the provision is mandatory, it is unconstitutional, as we next explain. In either event, the Executive Branch is under no obligation to implement Section 214(d). "[I]t is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983). And when the President acts in contravention of a statutory provision he deems unconstitutional, if a

### B. If Construed To Be Mandatory, Section 214(d) Unconstitutionally Interferes with the President's Exclusive Constitutional Authority to Recognize Foreign Governments.

"[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). In particular, Congress cannot overstep its bounds and exercise a power entrusted by the Constitution exclusively to the President. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."); *Chadha*, 462 U.S. at 954–955 (Congress cannot enact laws without bicameral passage and presentment of the bill to the President); *Myers*, 272 U.S. at 161 (Congress cannot restrict President's power to remove Executive Branch officers).

We have shown that Constitution vests exclusively in the President the authority to recognize foreign sovereigns; that the power to establish diplomatic relations includes the power to determine the policy of recognition; and that a necessary incident of the latter power is the authority to determine whether, how, and when to recognize the territorial claims of foreign sovereigns. *See supra* 4–6; 22–23.

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justiciable challenge is brought, courts will evaluate the provision and uphold the Executive's action if they agrees that the provision is unconstitutional. *See, e.g., Myers v. United States*, 272 U.S. 52 (1925).

We have also explained that the Executive Branch has consistently viewed the status of Jerusalem as a matter to be resolved by negotiation between the parties, and that this policy is reflected in the State Department's policies and procedures for preparing passports of United States citizens born in Jerusalem. *See supra* 6–10. Just as the courts cannot override these core foreign-policy determinations by adjudicating individual cases or controversies, so too Congress cannot override them by enacting federal statutes. As the President has explained, if construed to be mandatory, Section 214(d) would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." JA 15. If mandatory, that provision is an unconstitutional intrusion on a "central prerogative[]" of the President. *Loving*, 517 U.S. at 757.[10]

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[10] Zivotofsky argues on appeal that the State Department's policy of not recording "Israel" on the passports of United States citizens born in Jerusalem is discriminatory against supporters of Israel. Br. 42–46. Zivotofsky did not raise this argument below, except in a cursory fashion, and therefore has waived it. *Dunning v. Quander*, 508 F.3d 8, 11 (D.C. Cir. 2007). In addition, Zivotofsky's complaint does not assert any discrimination claim (*see* JA 8–10) and one cannot be raised now. *See Cody v. Harris*, 409 F.3d 853, 859 (7th Cir. 2005) ("[A] plaintiff cannot amend his complaint in his appeal brief."). In any event, there can be no serious dispute that the Executive Branch has refrained from recognizing any nation's sovereignty over Jerusalem not to discriminate against supporters of Israel, but to permit the Israelis and Palestinians to jointly determine the status of that city through negotiations. *See, e.g.*, JA 57.

## CONCLUSION

For the foregoing reasons, the Court should affirm the dismissal of Zivotofsky's complaint.

Respectfully submitted,

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Aril 4, 2008

## STATUTORY AND REGULATORY ADDENDUM

**28 U.S.C. § 211a. Authority to grant, issue, and verify passports**

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States and by such other employees of the Department of State who are citizens of the United States as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States under such rules as the President shall designate and prescribe for and on behalf of the United States and no other person shall grant, issue, or verify such passports. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers.

**Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214, 116 Stat. 1350 (2002) ("United States Policy with Respect to Jerusalem as the Capital of Israel")**

> (a) CONGRESSIONAL STATEMENT OF POLICY. — The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995 (Public Law 104-45; 109 Stat. 398), to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.
>
> (b) LIMITATION ON USE OF FUNDS FOR CONSULATE IN JERUSALEM. — None of the funds authorized to be appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.
>
> (c) LIMITATION ON USE OF FUNDS FOR PUBLICATIONS. — None of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which

lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. — For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

SEA" as the birthplace in the passport with the appropriate birthplace code.

b. **Birth in the Air**: If birth or citizenship documents show that birth occurred in the air, and no country has sovereignty over the area of birth, write "IN THE AIR" as the birthplace in the passport with the appropriate birthplace code.

| **NOTE:** See 7 FAM 1110 for adjudication guidance regarding birth in the air, territorial seas or international waters. |
|---|

# 7 FAM 1360 APPENDIX D BIRTH IN ISRAEL, JERUSALEM, AND ISRAELI-OCCUPIED AREAS

*(CT:CON-199; 10-23-2007)*

a. **Background**. As a result of the June 1967 Arab-Israeli War, the Government of Israel currently occupies and administers the Golan Heights, the West Bank and the Gaza Strip. U.S. policy recognizes that the Golan Heights is Syrian territory, and that the West Bank and the Gaza Strip are territories whose final status must be determined by negotiations.

b. **Birth in the Golan Heights**: The birthplace that should appear on passports whose bearers were born in the Golan Heights is SYRIA.

c. **Birth in the West Bank or in the No Man's Lands between the West Bank and Israel**: The birthplace for people born in the West Bank or in the No Man's Lands between the West Bank and Israel is **WEST BANK**; Those persons born before May, 1948 in the area known as the West Bank may have PALESTINE listed as an alternate entry. Those born in 1948 or later may have their city of birth as an alternate entry. Persons born in the West Bank in 1948 or later may not have Palestine transcribed as an alternate entry.

d. **Birth in the Gaza Strip**: The birthplace for people born in the Gaza Strip, is GAZA STRIP. PALESTINE is the alternate acceptable entry **provided the applicant was born before 1948**.

e. **Birthplace in Israel**: Write ISRAEL as the place of birth in the passport **if and only if** the applicant was born in Israel itself (this does **not** include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the No Mans Lands between the West Bank and Israel). **Do not enter ISRAEL in U.S. passports as the place of birth for applicants born in the occupied territories.**

f. **Birthplace in Jerusalem**: For a person born in Jerusalem, write **JERUSALEM** as the place of birth in the passport. Do **not** write Israel,

Jordan or West Bank for a person born within the current municipal borders of Jerusalem._ For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation.

g. **Birthplace in Area Formerly Known as Palestine**: An applicant born in the area formerly known as Palestine (which includes the Gaza Strip, the Golan Heights, Jerusalem or the West Bank) may object to showing the birthplace. In such cases, explain the Department of State (CA)'s general policy of showing the birthplace as the country having present sovereignty. The Senior Passport Specialist, Supervisory Passport Specialist or Adjudication Manager at a domestic passport agency or center or supervisory consular officer or regional consular officer at a U.S. embassy or consulate may make an exception to show PALESTINE as the birthplace **if the applicant was born before 1948**. If the applicant was born in 1948 or later, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty.

h. For a person born **before** May 14, 1948 in a place that was outside Jerusalem's municipal limits and later was annexed by the city, either PALESTINE or the name of the location (area or city) as it was known before annexation may be used as an alternate entry. For a person born **after** May 14, 1948 in a place that was outside Jerusalem's municipal limits and later was annexed by the city, the alternate entry is the name of the location (area or city) as it was known before annexation.

i. If the applicant lists as place of birth on a passport application a jurisdiction other than that provided in this 7 FAM 1360 Appendix D, the passport authorizing officer should annotate the passport application with the correct place of birth code reflected in this guidance. If the passport applicant objects to the listing of the current area of sovereignty as defined in this guidance, the applicant may elect to list the area or city name as listed in this section. However, Passport authorizing officers will advise applicants that foreign officials who examine the passport and are unfamiliar with (or object to) the area name may question its appearance in the passport and possibly deny entry to the bearer. (See 7 FAM 1380 Appendix D.)

| Area Name | Birthplace | Alternate Entry |
|---|---|---|

| | | |
|---|---|---|
| Gaza Strip | GAZA STRIP | PALESTINE (if born before 1948);<br>City or Town of birth regardless of date of birth |
| Golan Heights | SYRIA | City or town of birth |
| Israel | ISRAEL | PALESTINE (if born before 1948);<br>City or Town of birth regardless of date of birth |
| Jerusalem | JERUSALEM | "PALESTINE" (if born before 1948 in an area which was later annexed by Jerusalem);<br>City or area of birth as it was known prior to annexation regardless of date of birth. |
| West Bank | WEST BANK | PALESTINE (if born before 1948);<br>City or Town of birth regardless of date of birth |
| Sinai | EGYPT | None |

# 7 FAM 1370 APPENDIX D BIRTH IN THE FORMER CANAL ZONE

*(CT:CON-173; 07-19-2007)*

For persons born in the former Panama Canal Zone on or after October 1, 1979, the place of birth in the passport **must** be listed as **PANAMA**. For persons born before October 1, 1979, write **PANAMA** as the place of birth; however, if the applicant objects to the use of either Panama as the place of birth designation in the passport enter the city or town of birth (for example, GATUN, **not** Canal Zone or Panama.)

# 7 FAM 1380 APPENDIX D CITY OF BIRTH LISTING

*(CT:CON-173; 07-19-2007)*

a. A U.S. citizen **born abroad** may choose to list the city or town of birth at the time of the applicant's birth or at the present time rather than the country if he or she objects to the country listing as set forth in this appendix, unless this appendix specifies otherwise. The city of birth only option is **not** available for persons born in the United States or its territories or outlying possessions.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief uses proportionately spaced font and contains 10,328 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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April 4, 2008

## CERTIFICATE OF SERVICE

I certify that on this 4th day of April, 2008, I caused the foregoing Brief for the Appellee to be filed with the Court and served on counsel by causing an original and fourteen copies to be HAND DELIVERED to:

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